



STATE OF NEW JERSEY

In the Matter of D.S,
Department of Corrections

**FINAL ADMINISTRATIVE ACTION
OF THE
CIVIL SERVICE COMMISSION**

CSC Docket No. 2021-1146

Discrimination Appeal

ISSUED: AUGUST 6, 2021 (JET)

D.S., a Correctional Police Lieutenant with the Department of Corrections, appeals the determination of the Equal Employment Division (EED), Department of Corrections, which found that the appellant failed to support a finding that he had been subjected to a violation of the New Jersey State Policy Prohibiting Discrimination in the Workplace (State Policy).

The appellant’s supervisors submitted a complaint on July 14, 2020 by e-mail alleging that the appellant alleged he was discriminated against on the basis of race and subjected to retaliation by P.M., an Administrator, Prison Complex, A.G., an Assistant Superintendent 1, Corrections, A.W., a Correctional Police Lieutenant, N.R., a Correctional Police Lieutenant, S.M., a Correctional Police Sergeant, and A.H., a Senior Correctional Police Officer.¹ Specifically, the appellant stated that he observed an employee, S.P., wearing a face mask that indicated “I Can’t Breathe,” which was not a mask issued by the appointing authority. The appellant alleged that he made an inquiry to his supervisors with respect to the COVID-19 guidelines and policies pertaining to the appropriate facial coverings that were required to be worn by employees as a result of the pandemic. The appellant stated that he indicated to his superiors that he was concerned as the mask may pose a threat to the facility and inmates.² The appellant also alleged that on July 16, 2020, A.H. told him “Northern never had a problem until ‘you outsiders’ showed up,” and the appellant reported that

¹ Personnel records reflect that A.H. retired from State service.

² The appellant indicated that he had such concerns due to the events that occurred after the George Floyd incident in Minnesota.

“I can only assume that by Outsider he means white people.”³ The EED conducted an investigation and it determined there was no violation of the State Policy.⁴

On appeal, the appellant asserts that he alleged that he sent an e-mail to his supervisors, B.K., D.P., and P.M., inquiring as to what the appointing authority considered as an acceptable face mask for employees to wear in response to the COVID-19 pandemic while on duty. The appellant states that he observed S.P., a (employee) wearing a mask which displayed the words, “I can’t breathe,” and as a result, he had concerns that the language displayed on the mask had potential to incite the inmates. The appellant contends that such language inappropriately referenced issues concerning police brutality and were political in nature. Further, the appellant states that he met with A.G. in his office to discuss the matter, and P.M. was also present. The appellant asserts that, at the time of the meeting, he was asked about what mask offended him, the appellant clarified that, although he was not offended by the mask itself, he reiterated his concerns about how the language that appeared on the mask would be perceived by the inmates and the other Officers. The appellant contends that he asked A.G. and P.M. for advice about what kind of masks were acceptable to be worn. In addition, the appellant asserts that P.M. advised him that the appointing authority did not, at that time, have a policy regarding the masks. The appellant adds that he disagreed and maintained that an inappropriate incident may occur if an employee wore a mask indicating “MAGA”⁵ or “#ALLLIVESMATTER.” The appellant states that P.M. informed him that staff has a right to free speech which the appointing authority could not change unless there was a finding of a violation of the State Policy.

Additionally, the appellant asserts that A.G. indicated that he understood the appellant’s concerns and said, “You have to protect the house,” and P.M. stated, “Think about this house ... a white father, a black mother, and all the kids are black ... we have to appease them because they are the majority ... what would you think would happen if [the appointing authority] told them they could not wear this kind of mask, there would be an uproar.” The appellant asserts that he informed A.G. and P.M. that he was offended by P.M.’s comments that “we have to appease the majority,”

³ The appellant also made allegations of workplace violence that were addressed by the appointing authority’s Special Investigations Division, which are not a part of this matter.

⁴ It is noted that, by e-mail dated July 16, 2020, the appointing authority notified employees that, on March 13, 2020, it distributed surgical masks to all facilities to be provided to staff at all entry points to wear within facilities. It further indicated that, on April 4, 2020, all staff were mandated to wear the surgical masks provided. It also indicated that at no time did the appointing authority authorize staff to wear masks other than the surgical masks provided by the appointing authority. In this regard, the appointing authority indicated that, since April 4, 2020, all staff entering the facilities would wear the surgical masks provided and would not alter the provided masks by providing any written messages, words or insignia on the masks. The e-mail provided that staff who did not follow the directive would initially be provided with time to comply, and otherwise would be found to have placed the safety and security of the facility in jeopardy, and be removed from duty, charged with leave, and issued a disciplinary charge for violation of violation of [policy] HRB 84-17(E1).

⁵ MAGA is a political slogan meaning “Make America Great Again.”

since it confirmed that employees would be treated in accordance with policies and procedures. The appellant adds that he left A.G.'s office as a result of P.M.'s comments. Moreover, the appellant asserts that he was advised by e-mail dated July 15, 2020, that A.G. reported his concerns to the EED. The appellant maintains that he clarified to the EED investigators that his concerns were not related to the language listed on the mask, but rather, he was offended by P.M.'s comments. The appellant asserts that, since he was offended by comments made during the meeting, no information should have been disclosed to anyone except for the EED.

The appellant asserts that, after leaving A.G.'s office, he observed on Northern State Prison's Facebook page that other Officers had referred to him as a racist and, as a result, he left the workplace. The appellant maintains that multiple comments were made including "Lt. S. needs to go," "fucking male Karen,"⁶ and "fukkk S."⁷ The appellant asserts that when he returned to work, he noticed that A.W. was wearing a mask indicating "I can't breathe." The appellant also contends that A.W. indicated that the appellant told her in 2017 that he was against Black people. The appellant explains that on July 16, 2020, he was surrounded by his subordinates and peers, was called a racist, and told that the facility never experienced race issues until "you outsiders showed up."⁸ Moreover, the appellant asserts that he requested a reassignment as a result of an incident that occurred on July 16, 2020, and as a result, he was reassigned to the Adult Diagnostic and Treatment Center.

In response, the EED maintains there was no violation of the State Policy, and it relies on its underlying determination.

CONCLUSION

N.J.A.C. 4A:7-3.1(a) provides that under the State Policy, discrimination or harassment based upon the following protected categories are prohibited and will not be tolerated: race, creed, color, national origin, nationality, ancestry, age, sex/gender (including pregnancy), marital status, civil union status, domestic partnership status, familial status, religion, affectional or sexual orientation, gender identity or expression, atypical hereditary cellular or blood trait, genetic information, liability for service in the Armed Forces of the United States, or disability. A violation of this policy can occur even if there was no intent on the part of an individual to harass or demean another. Additionally, retaliation against any employee who alleges that she

⁶ The definition provided by Urban Dictionary for "male Karen" indicates "male equivalent of a Karen; a man who is never satisfied with the service at any establishment, and who frequently demands to speak to the manager in hopes of getting a freebie if he just complains loud enough."

⁷ In support, the appellant provides a copy of the alleged content of the facebook page. No date is listed on the facebook content. The majority of the remarks do not directly refer to the appellant, and his name is not listed on the facebook page's content as a participant in the conversations.

⁸ The appellant states that when he entered the workplace on July 16, 2020, he noticed that his subordinates and peers were wearing face masks indicating "Black Lives Matter" and "I Can't Breathe."

or he was the victim of discrimination/harassment, provides information in the course of an investigation into claims of discrimination/harassment in the workplace, or opposes a discriminatory practice, is prohibited by the State Policy. Examples of such retaliatory actions include, but are not limited to, termination of an employee; failing to promote an employee; altering an employee's work assignment for reasons other than legitimate business reasons; imposing or threatening to impose disciplinary action on an employee for reasons other than legitimate business reasons; or ostracizing an employee (for example, excluding an employee from an activity or privilege offered or provided to all other employees). See *N.J.A.C.* 4A:7-3.1(h). *N.J.A.C.* 4A:7.3-2(m)(3) states, in pertinent part, that the appellant shall have the burden of proof in all discrimination appeals.

N.J.A.C. 4A:7-3.1(e) provides that supervisors shall make every effort to maintain a work environment that is free from any form of prohibited discrimination/harassment. Supervisors shall immediately refer allegations of prohibited discrimination/harassment to the State agency's Equal Employment Opportunity/Affirmative Action Officer, or any other individual designated by the State Agency to receive complaints of workplace discrimination/harassment. A supervisor's failure to comply with these requirements may result in administrative and/or disciplinary action up to and including termination of employment. For purposes of this section and *N.J.A.C.* 4A:7-3.2, a supervisor is broadly defined to include any manager or other individual who has the authority to control the work environment of any other staff member (for example, a project leader). *N.J.A.C.* 4A:7-3.2(d) provides that supervisory employees shall immediately report all alleged violations of the State Policy to the EEO/AA Officer. Such a report shall include both alleged violations reported to a supervisor, and those alleged violations directly observed by the supervisor.

N.J.A.C. 4A:7-3.1(j) establishes that all discrimination complaints and investigations shall be handled, to the extent possible, in a manner that will protect the privacy interests of those involved. To the extent practical and appropriate under the circumstances, confidentiality shall be maintained throughout the investigatory process. In the course of the investigation, it may be necessary to discuss the claims with the person(s) against whom the complaint was filed and other persons who may have relevant knowledge or who have a legitimate business need to know about the matter. All persons interviewed, including witnesses, shall be directed not to discuss any aspect of the investigation with others in light of the important privacy interests of all concerned. Failure to comply with this confidentiality directive may result in administrative and/or disciplinary action, up to and including termination of employment.

In this matter, the appellant argues that he initially inquired with his supervisors about what was considered proper procedure with respect to face masks, as he was concerned that the language that he observed on various masks had the

potential to incite the inmates and cause an issue with the safety of the workplace. The appellant also argues that his supervisor's comments in response to his concerns constitute a violation of the State Policy. The appellant also indicates that he observed on Northern State Prison's Facebook page that various Officers made derogatory comments about him, and he was reassigned as a result of the incident.

The Commission has conducted a review of the record in this matter and finds that the appellant has not established that he was subjected to discrimination in violation of the State Policy. Initially, with respect to the appellant's comments that he was not offended by the words that appeared on S.P.'s face mask, even if the appellant, as he contends, was not offended by such language, he still raises that issue in this matter and in his initial complaint. As such, the Commission will address the issue with respect to the language that appeared on S.P.'s mask. The Commission finds that the language that appeared on S.P.'s mask, "I can't breathe," does not, in and of itself, implicate any of the above listed categories of the State Policy. Even if such language may have been referenced with respect to the George Floyd incident, the Commission finds that such language does not constitute a violation of the State Policy. As will be discussed more fully below, if the mask violated the appointing authority's policy pertaining to face masks, and the appellant was concerned about the safety of the facility, then the appointing authority should have addressed such concerns in accordance with such policy.

With respect to the appellant's concerns pertaining to the safety of the facility due to the language that appeared on the face mask, the safety of the facility is outside the scope of this matter and will not be addressed. Nonetheless, the issue will be discussed for informational purposes only. The appellant admits in this matter that he specifically contacted his superiors in order to inquire if the language that appeared on the mask was appropriate as he perceived that it could be a concern to the safety of the facility. The record reflects that, prior to when the appellant contacted his supervisor in July 2020, the appointing authority had already issued a policy pertaining to the proper utilization and appearance of face masks. As noted above, the July 16, 2020 e-mail indicated that the appointing authority notified employees on March 13, 2020, that surgical masks were provided to staff at all entry points to wear in the facilities. The e-mail further indicated that on April 4, 2020, the appointing authority mandated staff to wear the provided surgical masks, and that the masks would not be altered by any messages, words or insignia, and the appointing authority did not authorize staff to wear any masks other than the surgical masks provided. The e-mail provided that staff who did not follow the directive would initially be provided with the opportunity to comply, or otherwise would be removed from duty, charged with leave, and issued a disciplinary charge for placing the safety of the facility in jeopardy. As noted above, the appellant reported his perceived violations of the face mask policy to his superiors, and in turn, his superiors should have reported those concerns to the appointing authority pursuant to the above listed face mask policy. It is unclear from the record if his superiors

reported the language that appeared on the face mask to the appointing authority. Accordingly, if it has not already done so, the appointing authority is recommended to review if S.P. was wearing the appropriate face mask on the day the incident occurred as alleged by the appellant.

Additionally, the record reflects that the EED conducted a proper investigation. It interviewed the relevant parties in this matter and appropriately analyzed the available documents in investigating the appellant's complaint. The appellant did not provide any substantive evidence to show that he was discriminated against by P.M., A.G., A.W., N.R., S.M., and A.H. based on his race, nor did he show that he was subjected to retaliation. As noted above, the appellant states that P.M. made the comments, "Think about this house ... a white father, a black mother, and all the kids are black ... we have to appease them because they are the majority ... what would you think would happen if [the appointing authority] told them they could not wear this kind of mask, there would be an uproar." The statements attributed to P.M. were not confirmed by the appointing authority to have been made by her at the time of the incident, and the appellant did not provide any substantive evidence in this matter to show that P.M. made the comments attributed to her. Although the appellant states that he disagreed with his superiors and exited A.G.'s office, disagreements between co-workers cannot sustain a violation of the State Policy. See *In the Matter of Aundrea Mason* (MSB, decided June 8, 2005) and *In the Matter of Bobbie Hodges* (MSB, decided February 26, 2003). As such, the appellant did not meet his burden of proof in this matter. Moreover, since the appellant indicated that he was offended by P.M.'s alleged comments, the appellant's supervisors properly referred the matter to the EED for an investigation as a part of their supervisory responsibilities.

Regarding the appellant's concerns that he was reassigned, it appears he is arguing that the reassignment was due to retaliation. The appellant has provided no substantive evidence in this matter to show that he was subjected to retaliation. In fact, the appellant admits in this matter that he requested a reassignment due to an incident that occurred on July 16, 2020. Due the nature of an EED investigation and the business needs of an agency, the appointing authority may reassign an employee in the face of an EED investigation. Based on the circumstances presented in this case, the appointing authority properly reassigned the appellant to another facility. Accordingly, the appellant's contentions pertaining to his reassignment are not persuasive.

With respect to the alleged comments made about the appellant on the Facebook page, the appellant is not listed on the Facebook page as a participant in the conversation, and the majority of the comments, in and of themselves, do not refer specifically to the appellant. As such, the appellant did not confirm that the Facebook conversation is directly attributed to him. Additionally, no date is listed on the Facebook conversation and, as such, it is unclear as to when the conversation occurred. Although the appellant states that he discovered the comments prior to

when he left work, he has not provided any substantive evidence to show exactly when the Facebook conversation took place. Although the appellant states that the comments include “Lt. S. needs to go,” “fucking male Karen,” and “fukkk S.,” while such language is inappropriate, there is no nexus between the comments and the State Policy to show that there was a violation of any of the protected categories of the State Policy. Although a “male Karen” may touch on the State Policy, there is no substantive evidence that the statement directly referred to the appellant. As such, the comments that appear on the Facebook page do not establish the appellant’s contentions. It also appears that the appellant is arguing that a violation of the confidentiality provisions of the State Policy occurred as a result of the conversation that took place on the Facebook pages that he submits in this matter. A review of the Facebook pages does not reveal any indication that the members of the conversation are referring to the appellant’s EED complaint. Although the conversation does include language about face masks and a memorandum being issued pertaining to face masks, such information does not substantially show that there was a violation of the confidentiality provisions of the State Policy. Moreover, since no date is listed on the Facebook pages, it cannot be confirmed if the Facebook conversation occurred before or after the EED complaint was filed. If such conversation occurred before the EED complaint was filed, then the confidentiality provisions were not applicable at the time, as there cannot be a finding that there was a violation of the confidentiality provisions of the State Policy prior to the filing of an EED complaint.

Therefore, other than the appellant’s allegations in this matter, he has failed to provide any evidence that he was discriminated or retaliated against in violation of the State Policy. Accordingly, he has not satisfied his burden of proof in this matter.

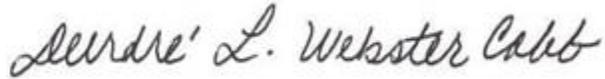
One final matter warrants comment. The Commission finds that, based on prior matters, the existence of a Facebook page for Northern State Prison is problematic. *See, i.e., In the Matter of Robert Curry, Department of Corrections* (CSC, decided June 2, 2021) (Appellant’s initial removal modified to a 90 working day suspension for liking a post on Facebook pertaining to an inappropriate racial comment). As such, if it has not already done so, it is appropriate to recommend that the appointing authority address and remove any Facebook pages pertaining to Northern State Prison as soon as possible after the issuance of this decision. If the page is not under the auspices of Northern State Prison, if it has not already done so, it should promulgate specific policies regarding what type of activities would be considered inappropriate on social media.

ORDER

Therefore, it is ordered that this appeal be denied.

This is the final administrative determination in this matter. Any further review should be pursued in a judicial forum.

DECISION RENDERED BY THE
CIVIL SERVICE COMMISSION ON
THE 4TH DAY OF AUGUST, 2021



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